

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: CFD REALTY, LLC AND JS PALLET CO., INC.
NOTICE OF VIOLATION OC&I C03-0259**

AAD NO. 09-004/FWE

DECISION AND ORDER

Background

This matter came on for Hearing on September 25, 2012 before Hearing Officer David M. Spinella. Respondents filed an Appeal on August 24, 2009 from a Notice of Violation of Freshwater Wetlands Statutes and Regulations. The parties stipulated that this Tribunal and the Department of Environmental Management ("RIDEM") have Jurisdiction over the Respondent pursuant to RIGL §42-17.1-2 et. seq. (Stipulated Fact 7).

The subject property abuts Lockbridge Street in Pawtucket, Rhode Island into the Town of Lincoln, Rhode Island (the "Property") and runs along the Moshassuck River. The property is currently owned by CFD Realty LLC, which acquired the property on December 29, 2003.

The first witness was Mr. Howard Cook, who is a senior environmental scientist with the RIDEM, Office of Compliance and Inspection ("OC&I"), Wetlands Enforcement section. (TR. pg. 11). He testified as an expert in wetlands biology. On September 23, 2003 he responded to the subject property to investigate a wetlands complaint. (Stipulated Fact 3). The complaint indicated there were unauthorized wetlands alterations at the property. (TR. pg. 12). Mr. Cook met with Mr. Carlos DaSilva, the owner of JS Pallet Co. and Owner of CFD Realty (Stipulated Facts 1 and 2). Mr. Cook discovered unauthorized work within Freshwater wetlands, specifically 200 foot riverbank wetland and 100 year floodplain (TR. pg. 13 Lines 5-7). He explained to Mr. DaSilva

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that all materials, pallets and pavement would have to be removed from the twenty (20) foot buffer area. He testified that Mr. DaSilva stated he understood. (TR. pg. 16 Lines 13-16).

Mr. Cook then stated that previous owners of the subject property were also sent Notices of Violations ("NOV") regarding restoration work to be performed (Revegetation) within the same twenty (20) foot buffer but the work was never completed. (TR. pg. 17 Lines 3-18). It appears from the testimony of Mr. Cook, and later from Mr. Harold Ellis, that a Notice of Violation was never recorded in Land Evidence Records in Pawtucket or Lincoln against any of the previous owners of the property.

After Mr. Cook's inspection of the property on September 23, 2003, the RIDEM issued a Notice of Intent to Enforce ("NOIE") on November 20, 2003 to JS Pallet Co., Inc., as the operator, ordering the restoration of a portion of the property (Joint Exhibit 4 Full and Stipulated Fact 4). Mr. Cook did not remember doing any subsequent inspections of the site until June 16, 2009. (TR. pg. 31 Lines 6-11 and Stipulated Fact 7). That inspection revealed pallets, tractors and vehicles being stored within a 100 year floodplain and twenty (20) foot wide strip at the top of a slope which was supposed to have been vegetated (TR. pg. 32 Lines 10-15). Mr. Cook stated that these Respondents did not do any of the work as ordered in the Notice of Intent to Enforce (TR. pg. 32 Lines 15-17). Therefore, on August 3, 2009, the RIDEM issued a Notice of Violation to the Respondents. (Stipulated Fact 6). The NOV was recorded in the Land Evidence for the Town of Lincoln on August 17, 2009 and in the Land Evidence Records for the City of Pawtucket on August 7, 2009 (Joint Exhibits 24 and 25 Full).

Mr. Cook then stated that the Respondents made additional alterations to the buffer after the Notice of Intent to Enforce was sent. (TR. pg. 34 Lines 19-21). These alterations consisted of the installation of a large propane tank and a heat treatment facility and there was additional paving

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(TR. pg. 35 Lines 1-4). These alterations were confirmed by Mr. Cook's subsequent visit and aerial photographs. (TR. pgs. 35 and 36).

There was testimony regarding a previous owner, Gus Delfarno, and the fact that he was cited as far back as 1980 for wetland buffer violations at the same location. (TR. pg. 40). The OC&I and Respondents concurred that Delfarno, at the very least, agreed to remediate the site and a Consent Agreement was prepared but never signed (Joint Exhibit 13 Full and TR. pg. 41). Also, letters from Delfarno's attorney were submitted to demonstrate his intent to remediate or that he in fact completed the remediation/ restoration (TR. pg. 44). The gist of Respondents' argument is that there has always been a wetlands encroachment issue at this site due to the actions of Respondent's predecessors in title and not by Respondents.

However, the testimony demonstrated that in addition to the existing unresolved and unrecorded violations from the previous owners, new violations were discovered by OC&I since the Respondents took Title to the property (e.g. Installation of propane tank, heat treatment facility and paving). (TR. pgs. 35 and 36). Mr. Cook stated that when the new violations are resolved, the old issues will be resolved as well. (TR. pg. 52).

Mr. Harold Ellis, supervisor of the Wetlands Compliance Program in the Office of Compliance and Inspection of the Rhode Island Department of Environmental Management testified next. He is familiar with the subject property and the history of violations against the previous owners and current owner. (TR. pg. 68). He acknowledged that his office did reach an agreement to resolve the wetlands encroachment issues with Mr. Delfarno, who owned the property in or about 1986 (TR. pg. 70). He reaffirmed that the property was now being used for different purposes than Mr. Delfarno used it for and there were new wetlands violations. For example, wood pallets were now being stock piled in the area of twenty (20) feet along the top of the riverbank.

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There were some tractors. Asphalt was installed on some of the areas that should have been loamed and seeded (TR. pg. 71). Thus, he testified that a decision was made to send the NOIE and NOV when the current Respondents did not comply after Mr. Cook's inspection in 2003. (TR. pg. 72). Lastly he noted that it often takes a long time to respond to these cases due to a staff shortages and "how many fires we have to put out" (TR. pg. 72).

Mr. Carlos DaSilva then testified in rebuttal that he is the owner of CFD Realty LLC and the owner of JS Pallet Company, Inc. (TR. pg. 76). He had worked at the property for many years before purchasing it. In fact, he worked for Mr. Delfarno at the property, but claims he did not know anything about the issues with RIDEM until 2003 after he purchased the property (TR. pg. 80).

He said that his immediate predecessor in title and owner of JS Pallet, Mr. Joseph Silva, used the property in the same fashion that he currently uses it for. But, he insists that he did not know about the twenty (20) foot buffer issue until Mr. Cook's first visit or at the very least the letter (NOIE) that was sent in 2003. (TR. pg. 81).

The OC&I acknowledges that a Notice of Violation was not recorded during the time Mr. Delfarno or Mr. Silva owned the property. (TR. pg. 52).

Issues

The Respondents essentially argue that previous unrecorded violations against the property, committed by previous owners were not called to their attention prior to purchasing the property in 2003 and therefore, they are not responsible for those violations. Respondents further argue that they continued to use the property in the exact manner as their immediate predecessor in title and

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since no violations were of record, they should not be held responsible for them. The flaw in Respondents' argument is that after inspection of the property in 2003 by Mr. Cook, new violations were discovered and OC&I responded by sending a NOIE and ultimately an NOV which Respondents have failed to comply with. These new violations are interrelated with the still existing wetlands encroachment issues that have plagued this property since the 1980's.

Assuming, arguendo, that OC&I recorded a Notice of Violation against Mr. Delfarno and / or Mr. Silva that a title search would have revealed and placed the Respondents on notice before he purchased the property, these Respondents caused the clock to be reset with new encroachments/ violations they committed that were discovered during Mr. Cook's site inspection in 2003.

The RIDEM did not introduce any evidence concerning the assessment of penalties in this matter.

I. Joint Exhibits

1. Joint Exhibit 1 Full – 2003 Inspection Report and Biological Report.
2. Joint Exhibit 2 Full – Aerials from 1970, 1985, 1992, 1195, and 2003.
3. Joint Exhibit 3 Full – 2009 Notice of Violation (“NOV”).
4. Joint Exhibit 4 Full – 2003 Notice of Intent to Enforce (“NOIE”).
5. Joint Exhibit 5 Full – Site Inspection Report from June 2009.
6. Joint Exhibit 6 Full – Aerial photo of subject property, taken from Google Earth, dated 2009.
7. Joint Exhibit 7 Full – Aerial photo of subject property, taken from Google Earth, dated 2012.
8. Joint Exhibit 8 Full – Hank Ellis resume.

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9. Joint Exhibit 9 Full – Howard Cook resume.
10. Joint Exhibit 10 Full – David Chopy resume.
11. Joint Exhibit 11 Full – Copy of Notice of Violation C-748, issued to Delfarno Trucking Company, dated April 18, 1980.
12. Joint Exhibit 12 Full – Copy of Notice of Violation C-992, issued to Delfarno Trucking Company, dated August 5, 1980.
13. Joint Exhibit 13 Full – Consent Agreement, Notice of Violation C-992.
14. Joint Exhibit 14 Full – Copy of letter to Hank Ellis, dated June 30, 1988. 2 pages (2 letters)
15. Joint Exhibit 15 Full – Complaint Inspection Report, dated September 24, 2003.
16. Joint Exhibit 16 Full – Intra Office Memo, dated October 27, 2003.
17. Joint Exhibit 17 Full – Site Sketch, dated September 14, 2009.
18. Joint Exhibit 18 Full – Aerial photograph dated 1972.
19. Joint Exhibit 19 Full – Aerial photograph dated 1988.
20. Joint Exhibit 20 Full – Interoffice Memorandum, dated July 2, 2008.
21. Joint Exhibit 21 Full – Interoffice Memorandum, dated June 22, 2009.
22. Joint Exhibit 22 Full – Letter from Dean Albro, dated March 11, 1988.
23. Joint Exhibit 23 Full – Restoration Plan for Delfarno, stamped September 24, 1986.
24. Joint Exhibit 24 Full – Notice of Violation (“NOV”) Bk. 3172 pg.163-170 8/7/09 @ 2:51 Pawtucket.
25. Joint Exhibit 25 Full – Notice of Violation (“NOV”) Bk. 1602 pg. 171-178 8/17/09 @ 2:27 Lincoln

II. Findings of Fact – Stipulated by Parties

1. CFD Realty, LLC is the owner of the subject property located at Lockbridge Street, Pawtucket, RI 02860.
2. Mr. Carlos DaSilva is the owner/ operator of CFD Realty, LLC.
3. JS Pallet Co., Inc. is the operator of the facility existing on the subject property.
4. Mr. Carlos DaSilva is the owner of JS Pallet, Co., Inc.
5. On September 24, 2003, an inspector from RIDEM conducted an inspection of the facility.
6. On November 20, 2003, RIDEM issued a Notice of Intent to Enforce (“NOIE”) to the operator (JS Pallet Co., Inc.) ordering the restoration of a portion of the subject property.
7. On June 16, 2009, an inspector from RIDEM conducted an inspection of the facility.
8. On August 3, 2009, RIDEM issued a Notice of Violation (“NOV”) to the Respondents.
9. On August 24, 2009 Respondent filed an Appeal of the NOV with the Administrative Adjudicative Division of the Department of Environmental Management.
10. The Department has jurisdiction over the Respondent pursuant to Rhode Island General Laws §42-17.1-2 et. seq.
11. Harold Ellis is an expert in the area of wetlands biology.
12. Howard Cook is an expert in the area of wetlands biology.
13. Mr. DaSilva met with Mr. Harold Cook on September 24, 2007 and he was informed by Mr. Cook of the existing wetlands violations and of additional new violations found after Mr. Cook’s inspection.
14. Respondents, since acquiring the Property in 2003, have committed wetlands violations including but not limited to installing a large propane tank; heat treatment facility; installed additional paving and storage of pallets within a prohibited buffer zone.
15. Respondents have failed to resolve/ remediate the wetlands violations as outlined in the NOIE and NOV.
16. No evidence concerning the assessment of penalties was introduced.

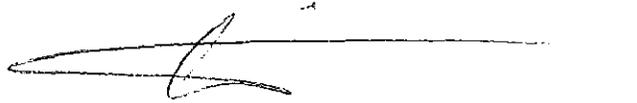
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III. Conclusions of Law

1. RIDEM has subject matter jurisdiction over Respondents at this matter pursuant to RIGL §42-17.1-2 et seq.
2. The Respondents violated the following statutes regulations and/ or other requirements:

Rhode Island General Laws §2-1-21, Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998 and Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007, prohibiting activities which may alter freshwater wetlands without a permit from the RIDEM.
3. No penalties are assessed or imposed in this matter against Respondents.
4. Respondents appeal is hereby **DENIED** and **DISMISSED**.

Entered as an Administrative Order this 31ST day of October, 2012.



David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to Christopher A. Murphy, Esquire, Armstrong, Gibbons & Gnys, LLP, Suite 301, 155 South Main Street, Providence, RI 02903 and via interoffice mail to Richard M. Bianculli, Jr., Esq., DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, One Capital Hill, Providence, RI 02908 on this 31ST day of October, 2012.



NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.